No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND ECONOMISTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should overrule the dormant Commerce Clause holding of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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CASES

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
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Compare State v. Wayfair Inc.,
2017 SD 56 (2017) 6

Complete Auto Transit v. Brady,
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Comptroller of the Treasury of Md. v. Wynne,
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Dennis v. Higgins,
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Dep't of Revenue of Ky. v. Davis,
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Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.,
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Direct Marketing Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 13

Healy v. Beer Inst.,
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Joseph E. Seagram & Sons, Inc. v. Hostetter,
384 U.S. 35 (1966) 4

Joseph v. Carter & Weekes Stevedoring Co.,
330 U.S. 422 (1947) 4

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) ..... *passim*

National Bellas Hess, Inc. v. Department of Revenue of Illinois,
386 U.S. 753 (1967) 2

Or. Waste Sys. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 13

Pike v. Bruce Church,
397 U.S. 137 (1970) 8

Puget Sound Stevedoring Co. v. State Tax Comm'n,
302 U.S. 90 (1937) 4

Quill Corp. v. North Dakota,
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Spector Motor Serv. v. O'Connor,
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W. Lynn Creamery v. Healy,
512 U.S. 186 (1994) 9

Walling v. Michigan,
116 U.S. 446 (1886) 9

OTHER AUTHORITIES

Alm, James & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*,
33 Pub. Fin. Rev. 184, 186 (2005) 14

Anderson, Eric T. et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*,
47 J. Marketing Research 229 (2010) 14, 16

Avalara, *Avalara TrustFile: Pricing*,
https://perma.cc/S65G-2WRP 19

Brynjolfsson, Erik & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563 (2000) 18

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales (Oct. 2003)... 16

Crosby, Joe & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571 (Aug. 7, 2017)..... 19

Dumain, Emma, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014) 5

Einav, Liran et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1 (2014)..... 14

Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ 20

Fox, William F., *Retail Sales and Use Taxation, in* The Oxford Handbook of State and Local Government Finance (Robert D. Ebel & John E. Petersen eds., 2012)..... 12

Goolsbee, Austan, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561 (2000) 14

Goolsbee, Austan, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*, 15 J. Econ. Perspectives 13 (2001) 15

Greene, Jay, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014)..... 17

Klassen, Michael L., Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21 (1994) 14

Manzi, Nina, *Use Tax Collection on Income Tax Returns* 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015)..... 21

Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW 11

Nat'l Ass'n of State Budget Officers, Budget Processes in the States (2015)..... 12

PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) 19

Qiu, Linda, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017)..... 17

TaxJar, *Pricing*, https://perma.cc/VR3V-J9N4..... 20

Thimmesch, Adam, *Undue Burdens and the Retroactivity Issue in* Wayfair, The Surly Subgroup (Feb. 28, 2018), https://perma.cc/A6GV-CDTG. 8

U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm..... 12

Woo, Stu, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011)..... 17

INTEREST OF THE *AMICI*

Amici are professors of tax law and economics at universities across the United States. As scholars and teachers, they have considered the economic consequences of this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and have concluded that *Quill*'s dormant Commerce Clause holding should be overruled. *Amici* join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in *Appendix A.*[1]

SUMMARY OF THE ARGUMENT

While the Supreme Court is rightly reluctant to overrule its own precedents under any circumstances, the force of *stare decisis* is less powerful in some contexts than in others. Specifically, *stare decisis* exerts a weaker pull when judicial doctrine in the relevant area is based not on statutory interpretation but on changing competitive circumstances and evolving economic understandings. Antitrust law is a paradigmatic example of an area in which these conditions are met, but the argument for a flexible application of

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[1] Pursuant to Supreme Court Rule 37.2, petitioner and respondents have granted blanket consent to *amicus* briefs. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than *amici* and their counsel made such a monetary contribution to the preparation or submission of this brief.

precedent is similarly strong with respect to dormant Commerce Clause tax cases such as this one.

In *Quill Corp. v. North Dakota*, the Court emphasized that its dormant Commerce Clause analysis was based on "structural concerns about the effect of state regulation on the national economy." 504 U.S. 298, 312 (1992). The Court was especially concerned about the effect of taxation on the mail-order industry, and it believed that maintaining the physical presence rule would "foster[] investment by businesses and individuals." *Id.* at 315-18. It also believed that its rule would reduce compliance costs for businesses and individuals engaged in commerce across state lines. *See id.* at 313 n.6. For those reasons, the Court reaffirmed the physical presence rule first announced in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

The Court's decision in *Quill* was predicated on the competitive circumstances and economic understandings of its time. And in the quarter century since *Quill*, those circumstances and understandings have evolved. While the *Quill* Court was focused on the mail-order industry, it could not and did not foresee the meteoric rise of online retail, which has magnified the revenue losses that result from the physical presence rule. In the age of online retail, the physical presence rule has become a drag on economic efficiency and a potential impediment to investment across state lines. Meanwhile, the development of tax automation software over the past quarter century has led to a dramatic reduction in sales tax compliance costs for multistate retailers—so much so that overruling *Quill* would likely *reduce* aggregate compliance costs for

individuals and firms seeking to abide by state tax laws.

Thus, to overrule *Quill* now based on changed competitive circumstances and evolving economic understandings would be to take it on its "own terms." *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015). It would be to acknowledge that, regardless of whether *Quill* was rightly decided at the time, the factual assumptions upon which it was based do not apply to the Internet age. The Court should reverse the judgment below, eliminate the anachronistic physical presence rule for state sales tax collection, and update its dormant Commerce Clause jurisprudence to reflect a new technological and economic environment.

ARGUMENT

I. *STARE DECISIS* APPLIES WITH "LESS-THAN-USUAL FORCE" TO THE PHYSICAL PRESENCE RULE

It is "never a small matter" for the Supreme Court to overrule its own precedent. *See Kimble*, 135 S. Ct. at 2409. But it is a smaller matter in some areas of law than in others. For example, the Court "has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Id.* at 2412. The same reasons that justify a less rigid approach to precedent in the antitrust context apply equally to dormant Commerce Clause tax cases such as this one.

The Court in *Kimble* identified a number of factors that determine the strength of *stare decisis*, and each of these factors favors a flexible application of precedent here. First, "*stare decisis* carries

enhanced force when a decision . . . interprets a statute"—and correspondingly weaker force when a decision does not. *Id.* at 2409. Dormant Commerce Clause rules are, of course, nonstatutory. And while Congress could in theory modify any rule rooted in the dormant Commerce Clause doctrine, that fact alone has not stopped this Court from revising its dormant Commerce Clause precedents in the past. *See Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749-50 (1978) (overruling *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) and *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937)); *Complete Auto Transit v. Brady*, 430 U.S. 274, 289 (1977) (overruling *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). Indeed, one objective of the Court's dormant Commerce Clause case law is "to eliminate the demand and necessity for sweeping national legislation." *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting).

Second, *stare decisis* is stronger where Congress intervenes with frequency—and thus where Congress's decision not to supersede a judicial decision might be interpreted as acquiescence. *See Kimble*, 135 S. Ct. at 2409-10. In the area of state sales and use tax collection, congressional intervention is rare, and Congress cannot be said to have acquiesced to the Court's dormant Commerce

Clause holding in *Quill*.[2] To the contrary, the Senate voted 69-27 in May 2013 to pass the Marketplace Fairness Act, which would have overturned *Quill*'s holding and allowed states to impose sales tax collection obligations on retailers with annual gross receipts in total remote sales exceeding $1 million nationwide. *See* S. 743, 113th Cong. (as passed by Senate, May 6, 2013). The Marketplace Fairness Act also enjoyed strong bipartisan support in the House of Representatives, but that chamber's leadership refused to bring the bill to a floor vote. *See* Emma Dumain, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, Roll Call (Dec. 3, 2014), https://perma.cc/5WM3-YY6Q. The failure of the Marketplace Fairness Act suggests—at most—that a handful of members of one house of Congress are reluctant to jettison the physical presence rule; it does not indicate broad congressional support for the status quo.

Third, *stare decisis* is more powerful with respect to precedents that generate significant reliance interests. *See Kimble*, 135 S. Ct. at 2410 ("[C]onsiderations favoring *stare decisis* are at their acme" in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs." (internal quotation marks omitted)). But

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[2] The last significant congressional act addressing nexus requirements for state tax collection came nearly six decades ago, with the Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381–391). That legislation concerned income tax collection rather than the sales and use tax collection issues implicated by *Quill*.

importantly, the Court has said that only a "legitimate reliance interest" will warrant judicial accommodation. *See United States v. Ross*, 456 U.S. 798, 824 (1982) (noting that "the doctrine of *stare decisis* does not preclude" overruling precedent when "it is clear that no *legitimate* reliance interest can be frustrated by our decision" (emphasis added)). While other dormant Commerce Clause precedents may engender legitimate reliance interests, the physical presence rule has not. As long as consumers comply with state tax law, there is no tax advantage in purchasing goods from out-of-state vendors because consumers must pay use taxes when vendors fail to collect sales taxes.[3] Thus, insofar as consumers and vendors have come to rely on the tax evasion opportunities that the physical presence rule avails, that reliance interest is illegitimate because it is based on noncompliance with valid use tax laws.

Respondents have suggested that overruling *Quill* would upset the reliance interests of retailers who could be subject to "retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions." *See* Resp'ts' Brief in Opp'n 35. That concern has no basis. South Dakota has not sought to collect sales taxes

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[3] Taxes collected and remitted by out-of-state vendors are sometimes denominated as "sales taxes" and sometimes as "use taxes." *Compare State v. Wayfair Inc.*, 2017 S.D. 56, ¶5 (2017) (decision below) (describing tax that South Dakota requires out-of-state vendors to remit as "sales tax"), *with Quill*, 504 U.S. at 301 (describing tax that North Dakota sought to require out-of-state vendors to remit as "use tax"). The brief refers to taxes collected and remitted by vendors as "sales taxes" to distinguish them from "use taxes" remitted by consumers.

from any retailer for past transactions,[4] and thus this Court can—if it chooses—grant South Dakota all the relief that the state requests while making its ruling in this case purely prospective. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (applying new rule in a civil case on a purely prospective basis); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 110–111 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (noting that "it is sometimes appropriate in the civil context to give only prospective application to a judicial decision" when the decision "overrule[s] clear past precedent"). Moreover, no state or municipality has suggested that it will seek to collect sales taxes on past transactions from remote retailers, and dormant Commerce Clause precedents that go unchallenged in this case would likely prevent any jurisdiction from doing so.[5] Respondents' fear of retroactive

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[4] *See* S.B. 106, § 5 ("No obligation to remit the sales tax required by this Act may be applied retroactively."); *id.* § 6 (providing that retailers who lack a physical presence in South Dakota will not be liable for sales tax on transactions that occur while this litigation is pending).

[5] One obstacle that would potentially prevent a state from collecting sales taxes retroactively from a remote retailer is the fact that all states with sales taxes also maintain use taxes which they have imposed on (though not always collected from) consumers who purchased goods from out-of-state sellers. Org. for Econ. Co-Operation & Dev., OECD Economic Surveys: United States 96 (2005). Remote retailers could—and presumably would—argue that the imposition of two taxes on interstate transactions subjects interstate commerce "'to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.'" *See Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1822 (2015) (quoting *J. D. Adams Mfg. Co. v. Storen*, 304 U.S.

liability is grossly overstated—and, in any event, the concern is one that this Court can squelch by making its holding prospective only.

Fourth and finally, *stare decisis* is at its weakest when the relevant area of law is explicitly based on changing competitive circumstances and evolving economic understandings. As the Court in *Kimble* explained, *stare decisis* operates with diminished force in the context of the Sherman Antitrust Act because

> Congress . . . intended that law's reference to "restraint of trade" to have changing content, and authorized courts to oversee the term's dynamic potential. We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases

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307, 311 (1938)). Relieving this burden by allowing remote retailers to claim an exemption in cases where the consumer has already paid use tax would—as a practical matter—be impossible, as consumers who pay use taxes often do not report the name of the retailer from whom goods were purchased. *See, e.g.*, S.D. Dep't of Rev., Use Tax Form, https://perma.cc/U9RR-VHZV (June 2016). And even if retroactive enforcement against remote retailers is not invalidated as discriminatory against interstate commerce, a state's attempt to collect sales taxes on transactions several years in the past might well place burdens on those retailers which would be deemed "excessive in relation to the putative local benefits," and thus the effort could fail on those grounds. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); Adam Thimmesch, *Undue Burdens and the Retroactivity Issue in* Wayfair, The Surly Subgroup (Feb. 28, 2018), https://perma.cc/A6GV-CDTG.

> was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them on their own terms.

Kimble, 135 S.Ct. at 2412-13 (alterations, citations, and internal quotation marks omitted).

The central question in dormant Commerce Clause tax cases is not far from the question in the Sherman Act context: whether a challenged tax "is, in effect, a regulation in restraint of commerce among the States." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). The Court often relies on economic analysis to answer that question. *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1803-04 (2015); *W. Lynn Creamery v. Healy*, 512 U.S. 186, 195 n.10 (1994). *Quill* itself is an example. There, the Court explained that "the Commerce Clause and its nexus requirement are informed . . . by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. In particular, the Court suggested that the physical presence requirement had supported the growth of the mail-order retail industry, and that maintaining the rule would "foster[] investment by businesses and individuals." *See id.* at 316. The Court was especially concerned about the cost to small vendors of complying with sales tax obligations imposed by each of "the Nation's 6,000–plus taxing jurisdictions." *See id.* at 313 n.6. Its decision to reaffirm the physical presence requirement rested on its understanding of the rule's economic effects. Thus, to overturn *Quill* "in light of sounder economic reasoning" would be to take the

decision "on [its] own terms." *Cf. Kimble*, 135 S. Ct. at 2413.[6]

II. THE COURT SHOULD OVERRULE *QUILL* IN LIGHT OF CHANGED COMPETITIVE CONDITIONS AND EVOLVING ECONOMIC UNDERSTANDINGS

While *Quill* was largely based on "structural concerns" about the effect of state taxation on the "national economy," those same concerns now cut against the physical presence rule. Four negative effects of the physical presence requirement merit emphasis. *First*, the physical presence rule poses a much more serious threat to the fiscal stability of state and local governments than the *Quill* Court could have anticipated. *Second*, the rule results in economically inefficient consumption choices to an extent that the *Quill* Court could not have foreseen. *Third*, the physical presence rule distorts firms'

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[6] Overruling *Quill*'s dormant Commerce Clause holding would still leave in place the limits on state taxing power imposed by this Court's *Complete Auto* test and by the Fourteenth Amendment's Due Process Clause. *See Complete Auto*, 430 U.S. at 279 (holding that a state tax will survive dormant Commerce Clause scrutiny only if it (1) "is applied to an activity with a substantial nexus with the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State"); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (opinion of Kennedy, J.) (recognizing that "[a]s a general rule," the Due Process Clause prohibits a state from exercising jurisdiction over an individual or entity unless that party "'purposefully avails itself of the privilege of conducting activities within the forum State'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

decisions about production, distribution, and corporate structure in ways that perversely discourage businesses from expanding across state lines. *Fourth* and finally, the physical presence rule likely *raises* the aggregate cost to consumers and businesses of complying with state sales and use tax laws.

A. Revenue Losses Resulting from the Physical Presence Rule Have Skyrocketed Since *Quill*

The revenue losses to state and local governments as a result of the physical presence rule far exceed anything that the *Quill* Court could have imagined—most notably because the *Quill* Court could not and did not foresee the rise of Internet retail. The Court in *Quill* was confronted with revenue-loss estimates of up to $3.27 billion per year across all 50 states.[7] Nearly 30 years later, the best available estimate pegs the revenue loss to state and local governments as a result of the physical presence requirement at $33.9 billion in 2018, rising to $51.9 billion by 2022.[8]

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[7] Br. of Amici Curiae Nat'l Gov'rs Ass'n et al. in Supp. of Resp. 24 n.13, 1991 U.S. S. Ct. Briefs LEXIS 666 (reporting $3.27 billion estimate for 1992 (citing Advisory Comm'n on Intergovernmental Relations, State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992, at 2 (1991))); *see also* Br. of Amici Curiae Ariz. Mail Order Co. et al. in Supp. of Pet'r 34 & n.40, *Quill v. North Dakota*, No. 91-194, 1991 U.S. S. Ct. Briefs LEXIS 537 (filed Nov. 21, 1991) ("Recent estimates of revenue loss range from $694 million to $3 billion per year.").

[8] Marketplace Fairness Coalition, *$221 Billion in Lost Revenue Over the Next 5 Years*, https://perma.cc/5YDL-WAZW (last visited Oct. 30, 2017).

Accounting for inflation, the revenue impact of *Quill* has jumped roughly six-fold since the time that *Quill* was argued and decided, with further increases yet to come.[9]

States effectively have two ways to make up for that revenue loss.[10] One is to cut spending on public goods and services. The other is to raise taxes on income, property, and sales made by retailers who maintain a physical presence within the state. Yet higher taxes on a narrower base generally reduce economic growth more than lower taxes on a broader base. For this reason, excluding online and other remote transactions from the sales tax base likely decreases the overall efficiency of state tax systems. *See* William F. Fox, *Retail Sales and Use Taxation*, *in* The Oxford Handbook of State and Local Government Finance 406, 415-16, 422-23 (Robert D. Ebel & John E. Petersen eds., 2012).

The fiscal cost of the physical presence requirement is especially significant given that *Quill* itself rested on the premise that interstate commerce generally "may be required to pay its fair share of state taxes." *Quill*, 504 U.S. at 301 n.5. Online retailers unquestionably benefit from state and local government investment in transportation and broadband infrastructure. Allowing these vendors to

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[9] *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 25, 2018).

[10] Forty-six states are subject to constitutional or statutory balanced budget requirements of varying force. *See* Nat'l Ass'n of State Budget Officers, Budget Processes in the States 52 tbl.9 (2015).

avoid state and local sales taxes is at odds with the "fair share" principles underlying the Court's dormant Commerce Clause tax cases. *See Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 102 (1994) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens." (alteration and internal quotation marks omitted)); *Complete Auto*, 430 U.S. at 281 ("[T]he Court consistently has indicated that interstate commerce may be made to pay its way . . . ." (internal quotation marks omitted)).

Thus, what at the time of *Quill* looked like a relatively narrow exemption for a mail-order industry of modest size has grown to be a gaping hole in state and local sales and use tax bases. As Justice Kennedy has noted, "*Quill* now harms States to a degree far greater than could have been anticipated earlier." *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). These revenue consequences are one—though not the only—reason that the Court should jettison the physical presence rule.

B. The Physical Presence Rule Leads to Economically Inefficient Consumption Choices

In the age of online retail, the physical presence rule reduces economic efficiency in ways that were not apparent at the time of *Quill*. When that case was decided, there was little evidence to suggest that consumers were changing their purchasing decisions in order to circumvent state and local sales taxes. *See* Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer*

Purchasing Decisions, 8 J. Direct Marketing 21, 22 (1994) (noting "a paucity of research on the subject of state sales tax effects on consumer behavior in mail order purchasing decisions"). Thus, there was little reason to believe that the differential taxation of in-state and out-of-state retailers distorted consumer decisionmaking to an economically significant degree.

Now, however, peer-reviewed economic research has demonstrated that a significant share of online shoppers alter their purchasing patterns so that they can evade state and local sales and use taxes. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561, 568 (2000) (estimating that as many as 24 percent of online shoppers would purchase offline if not for the opportunity to circumvent state and local sales taxes); James Alm & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*, 33 Pub. Fin. Rev. 184, 186 (2005) (putting that figure at 6 percent); Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 3 (2014) (estimating that "on average, the application of a 10 percent sales tax reduces purchases by 15 percent among buyers who clicked on an item" on eBay). If online retailers had collected sales taxes on those transactions, a large number of consumers would have switched to brick-and-mortar stores instead. Moreover, consumers are much more likely to alter their online purchasing patterns than to change their mail-order purchasing decisions in response to sales tax collection. *See* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 239 (2010) (finding that after a retailer begins

collecting state sales taxes, "Internet orders decrease by 11.6%" but "there is no apparent effect on catalog orders"). In other words, the physical presence rule appears to distort the decisions of online shoppers much more than it distorted the decisions of mail-order customers—a phenomenon that can be attributed to the fact that comparison-shopping is much easier online than via catalog. *See id.* at 236.

The distortion of consumer purchasing patterns resulting from the physical presence rule has negative consequences for economic efficiency. *See* Austan Goolsbee, *The Implications of Electronic Commerce for Fiscal Policy (and Vice Versa)*, 15 J. Econ. Perspectives 13, 19 (2001). The Congressional Budget Office offers the following example to illustrate the negative economic consequences that result from consumers altering their purchasing patterns in order to circumvent state and local sales taxes:

> For example, a consumer might choose to purchase books over the Internet for $100 inclusive of the shipping cost, pay no sales tax, and fail to comply with the use tax rather than purchase the same books at a local bookstore for $102 inclusive of a local $5 sales tax. The real resource cost of the books . . . purchased from the Internet seller is $100 . . . . The real resource cost of the same books . . . available for sale from the local bookseller is $97 . . . . Thus, the tax differential that results from the consumer's noncompliance with the use tax causes this consumer to make a choice that increases the production costs of books by $3. That money represents a loss of economic well-being to society because those $3 worth of

> resources could have been used to produce $3 worth of other goods or services.

Cong. Budget Office, Economic Issues in Taxing Internet and Mail-Order Sales, at 8 (Oct. 2003).

In sum, the physical presence rule leads consumers to make purchasing decisions that increase overall production costs—and those extra costs are, from society's perspective, pure waste. The result is that a doctrine motivated by "structural concerns about the effects of state regulation on the national economy" instead undermines economic well-being. *Cf. Quill*, 504 U.S. at 312. The *Quill* Court could not have perceived the full economic-efficiency costs of the physical presence rule because it could not have foreseen that the rule would distort the behavior of online shoppers so much more than it affected the purchasing patterns of catalog customers. *Cf. Kimble*, 135 S.Ct. at 2413 (Court "relatively free" to reverse precedent "that misperceived a practice's competitive consequences"). *Stare decisis* does not prevent the Court from correcting that error.

C. The Physical Presence Rule Discourages Vendors from Expanding Across State Lines

Beyond the distortion of consumers' purchasing decisions, the physical presence rule leads vendors to make inefficient decisions regarding production, distribution, and corporate structure. More specifically, the physical presence rule discourages vendors from expanding their operations into new states when doing so would trigger sales tax collection obligations in additional jurisdictions. *See* Anderson et al., *supra*, at 238-39 (analyzing store

expansion decisions of 14 retailers over 3 years and finding strong evidence that physical presence rule causes retailers to avoid opening stores in new states with sales taxes). This not only has negative effects on economic well-being but also undermines the dormant Commerce Clause's objective of promoting interstate economic activity.

The early years of Amazon.com provide a particularly vivid illustration of the "extreme measures" some companies take to avoid collecting state sales taxes. *See* Stu Woo, *Amazon Battles States Over Sales Taxes*, Wall St. J. (Aug. 3, 2011). The company reportedly distributed color-coded maps and spreadsheets to employees highlighting states that employees should avoid on business travel for fear that a physical presence—even if temporary—might trigger sales tax collection obligations. The company stopped recruiting at business schools in some states, and employees reportedly refrained from sending work-related e-mails if they ended up in a state where the company did not collect sales taxes. *See id.*[11]

Retailers have taken a number of further steps to avoid sales tax collection obligations in additional jurisdictions. In some cases, they have shut down warehouses for fear that a physical presence in a state might trigger sales tax liability. *See, e.g.*, Jay Greene, *Amid Rapid Expansion, Amazon to Shutter Kansas Warehouse*, Seattle Times (Oct. 1, 2014). In

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[11] Amazon now collects sales taxes in all states that have one, but it does not require third-party sellers on its site to collect state sales taxes. *See* Linda Qiu, *Does Amazon Pay Taxes? Contrary to Trump Tweet, Yes*, N.Y. Times (Aug. 16, 2017).

other cases, companies have split off their Internet businesses so that ownership of brick-and-mortar stores would not force the firm to collect sales taxes online. *See* Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 Mgmt. Sci. 563, 570 (2000). In many of these instances, firms are adopting inefficient distribution strategies and corporate structures solely for tax avoidance purposes. The resources that they devote to these efforts rather than to more productive ends constitute a deadweight loss to the national economy.

Worse yet, by discouraging firms from expanding across state lines, the physical presence rule undermines the dormant Commerce Clause's goal of promoting "economic union." *See Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting). When the physical presence rule causes a company to split off its operations in another state or to shutter its operations across state lines, it contributes to the very "economic Balkanization" that dormant Commerce Clause doctrine strives to avoid. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997). This marks one more way in which the *Quill* Court misperceived—or failed to foresee—the economic consequences of its holding, and one more reason why the Court should depart from that holding today.

D. The Physical Presence Rule Likely Raises the Aggregate Cost of Complying with State Sales and Use Tax Laws

Finally, the physical presence rule—which the *Quill* Court thought would reduce the cost of

complying with state tax laws—likely has the exact opposite effect. The *Quill* Court expressed concern about the "administrative and record-keeping requirements [that] could entangle a mail-order house" if it were subject to sales tax obligations in every jurisdiction. *Quill*, 504 U.S. at 313 n.6 (alterations omitted). But what the *Quill* Court failed to appreciate is that the physical presence rule does not make those administrative and recordkeeping burdens go away. It merely shifts those burdens from vendors to consumers, who are then left to comply with use tax obligations on their own.

In the years since *Quill*, vendors have gained access to sophisticated tax automation software that dramatically reduces the cost of complying with sales tax obligations in multiple jurisdictions. *See* Joe Crosby & Diane Yetter, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 575, 580 (Aug. 7, 2017) (concluding that in light of technological advances that post-date *Quill*, "even if a sales tax applied to every individual sale in every jurisdiction . . . , robust sales tax compliance would still be reasonably possible for all businesses at prices commensurate with their other regulatory obligations"); PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate—Volume One: Main Report* 18 (2006) (finding in survey of retailers nationwide that "having more nexus states did not necessarily result in higher sales tax compliance costs"). For $20 per month or less, small businesses can automate their sales tax preparation for every state. *See* Avalara, *Avalara TrustFile: Pricing*, https://perma.cc/S65G-2WRP (last visited Oct. 30, 2017); TaxJar, *Pricing*,

https://perma.cc/VR3V-J9N4 (last visited Oct. 30, 2017). Amazon also offers to calculate and remit sales taxes for sellers on its Marketplace platform for a small fee. Amazon.com, *Selling at Amazon.com: Tax Calculation Service Terms*, https://perma.cc/A654-H9NR (last visited Oct. 30, 2017).[12]

There has been no comparable technological transformation that has slashed compliance costs for consumers seeking to comply with their use tax obligations. Consumers still must track all of their purchases over the course of the year, determine when the vendor has collected sales tax and when it has not, and then calculate the use tax due on each item. Even the most fastidious personal recordkeepers will face difficult challenges in interpreting and applying state and local use tax laws that impose different rates on different products.

It is safe to assume, then, that the cost of complying with state sales and use tax obligations will be lower if the compliance burden is borne by vendors instead of consumers. Vendors generally enjoy scale economies and access to technologies that most consumers cannot match. To be sure, many consumers will incur no compliance costs because they will simply disregard their jurisdiction's use tax laws. *See* Nina Manzi, *Use Tax Collection on Income*

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[12] In addition, a majority of states now allow vendors to retain a small percentage of the sales taxes they collect in order to partially offset compliance costs. *See* Fed'n of Tax Adm'rs, *State Sales Tax Rates and Vendor Discounts* (Jan. 2017), https://perma.cc/K4TH-A3JQ.

Tax Returns 10 (Minn. House of Representatives, Research Dep't, Policy Brief, Apr. 2015) (noting that fewer than 2 percent of taxpayers reported use tax on state income tax returns in 2012). But insofar as the Court's concern is to make it easier for individuals and firms to comply with the law, that concern weighs against the physical presence rule's retention. By overruling *Quill*, the Court would reallocate the compliance burden from consumers who are ill-equipped to handle it to the vendors that are generally in a much better position to calculate and pay state sales taxes.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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MARCH 5, 2018

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